91-1279

Supreme Court, U.S.
FILED
FEB 5 1992
OFFICE OF THE CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAULINE KULZER, individually and as
Executrix of the Estate of Richard Kulzer, Deceased,

Petitioner,

-against-

OWENS-CORNING FIBERGLAS CORP.,

Respondent,

MANVILLE CORPORATION ASBESTOS DISABILITY COMP. FUND,

Respondent.

RESPONSE TO PETITIONER'S MOTION DIRECTING THE CLERK TO ACCEPT PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

RESPONSE FOR RESPONDENT OWENS-CORNING FIBERGLAS CORP.

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Preliminary Statement

Petitioner's Petition for Certiorari ("Petition") was filed more than ninety days after the denial of the Petitioner's petition for rehearing by the United States Court of Appeals for the Second Circuit (hereinafter "Second Circuit"). The Clerk of this Court properly declined to docket that Petition for Certiorari as "jurisdictionally out of time" pursuant to Rule 13 of the Rules of the Supreme Court of the United States.

Petitioner does not deny that her Petition was filed more than ninety days after the denial of her petition for rehearing. Petitioner argues instead that the Petition for Certiorari was timely because it was filed within ninety days of the denial of a subsequent motion before the Second Circuit, styled a Motion to Amend the Mandate. That motion sought the same relief which had been denied in the petition for rehearing. Moreover, it was not filed until one month after the denial of the petition for rehearing at a time when no action was pending between the parties because the complaint had been dismissed by the district court.

The Rules of this Court dc not permit a petitioner to extend artificially the time for filing a Petition for Certiorari by the filing of such a motion. Moreover, the Petition, which seeks "review of an erroneous mandate,"

(Petitioner's Motion at 4) fails to raise any issue warranting review on writ of certiorari.

Accordingly, Petitioner's Motion directing the Clerk to accept her Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

This asbestos personal injury action was first tried before a jury in the United States District Court for the Western District of New York in April, 1990 ("Kulzer I"). The jury returned a verdict in favor of defendant-respondent Owens-Corning Fiberglas Corporation ("OCF").[1] The trial court thereafter set aside the verdict and ordered a new trial. In November, 1990, after a second trial ("Kulzer II"), the jury returned a verdict for plaintiff-petitioner Pauline Kulzer ("Petitioner" or "Kulzer").

OCF appealed to the Second Circuit on numerous grounds including: (1) the district court twice improperly denied OCF's motions to dismiss Kulzer's wrongful death claim as barred by the Statute of Limitations; (2) the district court improperly granted Kulzer's motion for a second trial, substituting its judgment for that of the jury; and (3) OCF

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[1] In accordance with Rule 29 of the Rules of the Supreme Court of the United States, OCF states that OCF has no corporate parent and that, excluding wholly-owned subsidiaries, OCF has one non-wholly-owned subsidiary, Veroc Technology A/S.

was denied a fair second trial as the result of numerous errors committed by the district court.[2]

The Second Circuit reversed the judgment against OCF and remanded to the district court with instructions to dismiss the complaint.

Kulzer thereafter petitioned the Second Circuit for rehearing with a suggestion that the action be reheard in banc arguing, inter alia, that the Second Circuit erred in dismissing the entire complaint instead of just the wrongful death claim. On October 7, 1991, the Second Circuit denied the petition for rehearing. On November 1, 1991, the district court vacated the judgment against OCF and dismissed Kulzer's complaint.

On November 12, 1991, when there was no longer any action pending between the parties and nearly one month after Petitioner's motion for rehearing had been denied, Petitioner filed a motion styled a "motion to amend the mandate," again arguing that only the wrongful death claim should have been dismissed. On December 16, 1991, the Second Circuit denied Kulzer's motion. On January 6, 1992, more than ninety days after the denial of her petition for rehearing, Kulzer filed

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[2] Those errors included improperly shifting the burden of proof to defendant OCF on a critical issue, instructing the jury to disregard the intervening negligence of Kulzer's decedent's employer, and permitting inflammatory argument by Kulzer's counsel.

her Petition for Certiorari. The Clerk of this Court declined to docket the Petition and this Motion followed.

ARGUMENT

KULZER'S PETITION FOR CERTIORARI WAS UNTIMELY

Petitioner does not dispute that the Petition for Certiorari was not filed within ninety days of the denial of her petition for rehearing. The failure to do so, as the Clerk of this Court noted in rejecting the filing, was jurisdictional.

Rule 13 of the Rules of the Supreme Court of the United States expressly provides:

> .1 A petition for a writ of certiorari . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment.
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> .4 The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered. . . . However, if a petition for rehearing is timely filed in the lower court . . . the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

As this Court has held, the time limitations of Rule 13 reflecting Congress' mandate as set forth in Title 28, United States Code, Section 2101(c), are jurisdictional:

> Title 28 U.S.C. § 2101(c) (1982 ed.) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits.

Missouri v. Jenkins, 495 U.S. 33, ___, 110 S.Ct. 1651, 1660, 109 L.Ed. 2d 31 (1990).

Rule 13 further provides instructions to the Clerk of the Court with respect to untimely petitions:

> .3 The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

Petitioner's contention is that, because she made a motion subsequent to the denial of her petition for rehearing seeking the same relief, her time to file the petition for certiorari was somehow tolled. Petitioner, however, fails to offer any authority for this proposition.[3] Nor is there any reason to permit a petitioner to thus extend the mandated time limit by the filing of a subsequent and duplicative motion. These circumstances simply provide no justification for denying OCF the finality provided by the time limitations of Rule 13. After almost five years, two jury trials, an appeal, Petitioner's subsequent petition for rehearing with a suggestion for rehearing in banc, and her motion to amend the mandate, this litigation should finally conclude.

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[3] Indeed, the only cases cited by Petitioner, Crane v. American Standard, Inc., 490 F.2d 332, 341 (2d Cir. 1973) and Riley v. MEBA Pension Trust, 586 F.2d 968, 972 (2d Cir. 1978), have nothing whatever to do with the issue whether a motion to amend a mandate tolls the time for filing a petition for certiorari.

KULZER'S PETITION FAILS TO RAISE AN ISSUE WARRANTING REVIEW ON WRIT OF CERTIORARI

Even had Kulzer timely filed her Petition for Certiorari, review by this Court is not warranted.

As Kulzer concedes, the relief she seeks is addressed to an alleged error in the Second Circuit's mandate and does not concern "the propriety of the Second Circuit's legal opinion." Motion at 4. She argues, in essence, that the Second Circuit erred in discussing only one claim and dismissing three claims, notwithstanding that the Second Circuit, a Court familiar with the extensive record, declined to act when this alleged error was twice brought to the Court's attention.[4] Petitioner's assertion in her Petition for Certiorari that the alleged error of which she complains deprived her of her right to trial by jury is without merit.

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[4] Contrary to Petitioner's misleading suggestion that OCF did not challenge Petitioner's claim for conscious pain and suffering or her spousal derivative claim (Motion at 2) OCF, in fact, raised, briefed and argued before the Second Circuit issues challenging the entirety of Kulzer's judgment. Indeed, the extensive record before the district court, spanning almost five years, is replete with errors warranting the result reached by the Second Circuit -- the dismissal of Kulzer's action. Dissatisfied with that result, Kulzer petitioned the Second Circuit for rehearing, arguing that because the Second Circuit wrote solely concerning the wrongful death claim, the Court erred in dismissing the entire complaint. The Second Circuit denied the petition for rehearing, noting that the suggestion for rehearing in banc had been "transmitted to the judges of the court in regular active service and to any other judge that heard the appeal" and "no such judge has requested that a vote be taken."

On that logic, any appellate error following a jury trial would raise Seventh Amendment issues.

Clearly, Kulzer's Petition for Certiorari fails to raise any issue of constitutional dimension which would warrant the time and attention of this Court. It sets forth no "special or important reasons" for the grant of certiorari as described in Rule 10 of the Rules of the Supreme Court of the United States. Thus, even were Kulzer's Petition for Certiorari timely filed, it would not qualify for review on writ of certiorari.

Conclusion

For the foregoing reasons, Petitioner's Motion Directing the Clerk to Accept Petitioner's Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
February 4, 1992

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